States, as he taught, then Mr. Davis was not a citizen owing allegiance to the United States Government, after the secession of the Southern States, when the war had been levied; and if not a citizen owing allegiance to the United States, he could not commit treason against it. On the motion to quash the indictment the Chief Justice voted in the affirmative, while Underwood voted in the negative. Thereupon, the question was certified to the Supreme Court of the United States; and if ever decided by that court, no certificate of the fact has ever reached the lower court. But on February 11, 1869, the sureties on the bail bond were absolved, and the prosecution dropped, a happy solution of the difficult questions which confronted the Federal Government.

SALES OF CHATTELS — RETENTION OF POSSESSION BY SELLER.

The question which it is proposed to discuss briefly in this paper is the effect of non-delivery, or the retention of possession, by the vendor of a chattel, upon the title of a subsequent *bona fide* purchaser from the vendor. Reports and text-books abound in the discussion of the rights of *creditors* in such case, but in a somewhat elaborate search no discussion of the peculiar rights of the second *purchaser* has been found in any text-book, and decided cases involving such rights are comparatively rare. Wherever a text-writer deals with the subject, he confuses creditors and purchasers under the general designation of "third persons." The rule generally laid down in the books is that retention of possession is *prima facie* fraudulent as to third persons, but may be explained. And yet it is believed that whatever may be the rule as to creditors, or whatever differences of opinion may exist on that subject, there is practical unanimity amongst the courts as to the rights of subsequent *bona fide* purchasers in such case. And that rule is, that where the vendor of a chattel retains possession, and subsequently sells to a second *bona fide* purchaser for value, the latter's title will prevail over that of the first purchaser. There are innumerable *dicta* to the contrary, but the actual decisions are believed to be almost, if not altogether, unanimous in favor of the rule as stated.

There is some diversity of opinion as to the legal principles which induce the courts to prefer the second purchaser, but all reach practically the same result. These different views are: (1) That retention

of possession, whereby the original vendor is enabled to deceive an innocent second purchaser, is fraudulent *per se*, as a rule of law. (2) That the sale of a chattel must be accompanied by delivery of possession, in order to pass title as against innocent subsequent purchasers, regardless of any question of fraud. (3) That public and commercial policy demands that in the sale of a chattel there must be a change of possession in order to give notice to the public.

I. In *Rocheblave* v. *Potter*, 1 Mo. 561 (14 Am. Dec. 305), a case involving the rights of two purchasers of the same slave, the first having left the slave in possession of the seller, the court held that the second purchaser had better title, saying: "The creditor at large relies upon his knowledge of the debtor's character, his general property and apparent solvency . . .; whereas the purchaser, trusting rather to the title he may have to any specific property, pays the value of it, takes the property into his possession, and thereby strips the vendor, . . . in some measure of the means of committing further fraud."

If the property has been actually sold, in good faith, the creditor, relying as he does upon the debtor's general ability to pay, which has not been lessened by the sale—being a mere change in the form of the debtor's assets—is not misled by the retention of possession by his debtor, the vendor. For, as said in *Davis* v. *Turner*, 4 Gratt. 422: "The creditor has no right to insist that his debtor's resources shall remain in any given shape. The latter may exchange his goods for any other property; he may sell them and put the money in his pocket, or apply it in his discretion to his debts, his purchases or his maintenance." But this cannot be said of the subsequent purchaser. Relying not upon the seller's general ability or character, but upon the specific chattel, and laying out his money on the faith of the seller's title thereto, he is equally injured whether the first sale be actually fraudulent or actually *bona fide*. While, therefore, it is probably the law in most of the States, and certainly in Virginia, as decided in the leading case of *Davis* v. *Turner*, just cited, that retention of possession by the seller is only *prima facie* fraudulent as to creditors of the seller, there are the best of reasons for distinguishing the rights of *bona fide* subsequent purchasers.

The Virginia court, in *Williamson* v. *Farley*, Gilmer, 15, held that the retention of possession of a slave by the seller was conclusive evidence of fraud, in a contest between the first purchaser and a second, who had purchased without notice of the previous sale. This doctrine

was reaffirmed in *Glasscock* v. *Batton*, 6 Rand. 78. Until the decision in *Davis* v. *Turner* (*supra*) this was likewise the law in Virginia as to creditors—retention of possession being regarded as conclusively fraudulent as to both creditors and purchasers. But that case overruled the doctrine of previous cases so far as concerned creditors. It did not, however, overrule the doctrine as to subsequent *purchasers*. Judge Baldwin, who delivered the opinion, is careful to confine the ruling to *creditors*, and takes pains to distinguish between the rights of creditors and the rights of purchasers in such cases. In referring to the previous case of *Glasscock* v. *Batton*, he says: "It was, moreover, the case not of a fraud against a creditor, but of a fraud against a subsequent purchaser, who is, in some respects, *diverso intuitu;* for the latter lays out his money in the acquisition of specific property, and, when he does so without notice, may be deceived not only by bad faith, but by the gross negligence of the first purchaser in regard to the assertion of his demand."

The recent case of *King* v. *Levy* (Va.), 22 S. E. 492, seems to make no such distinction, but inasmuch as the subsequent purchasers in that case had notice of the previous purchase, as expressly found by the court, there was no necessity for adverting to the distinction. This case cannot be regarded as in any manner shaking the doctrine of *Glasscock* v. *Batton*. In the still later Virginia case of *Benjamin* v. *Madden*, 26 S. E. 392, involving the rights of creditors only, Judge Riely is careful to restrict the rule of *prima facie* fraud to creditors, and, in order to prevent misconception, goes out of his way to point out the distinction already referred to. "A different rule," says the learned judge, "seems to prevail in the case of a subsequent purchaser, who has parted with his money in the acquisition of specific property, on the faith of the vendor's possession and apparent ownership, without notice of the rights of the first purchaser, whose conduct has enabled the vendor to make a subsequent sale." We may, therefore, assert with confidence that the law in Virginia is, that where the vendor retains possession of the chattel sold, a subsequent purchaser from him, in good faith and for value, will acquire title as against the first purchaser, though the latter has acted in perfect good faith.

This doctrine prevails also in Kentucky: *Dale* v. *Arnold*, 2 Bibb, 605; *Waller* v. *Cralle*, 8 B. Mon. 11; and in Pennsylvania: *Shaw* v. *Levy*, 17 S. & R. 99; *Winslow* v. *Leonard*, 24 Pa. St. 14. Other Pennsylvania cases are cited below.

II. The second view taken by the courts, and especially those of Massachusetts, is, that while as between the parties, title to chattels passes by intention, there must be delivery of possession to the first purchaser in order to perfect his title as against both creditors and purchasers, regardless of any question of fraud. In these cases, nothing is said of the statutes of fraudulent conveyances, and no reference is made to *Twine's Case*, 3 Co. 80 b, or to *Edwards* v. *Harben*, 2 Durnf. & East, 587, the pioneer English cases on the subject of retention of possession as fraud *per se*. Under this view, the question hangs solely on the necessity of delivery to pass title as to third persons. The property may not in fact be in the possession of the seller.

The leading case in Massachusetts, *Lanfear* v. *Sumner*, 17 Mass. 110 (9 Am. Dec. 686), involved the rights of creditors only, but the court laid down the broad proposition, which seems to have been uniformly followed since in that State, that "The rule is perfectly well established, that delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendee. The following later cases, all following the doctrine of *Lanfear* v. *Sumner*, involved the rights of subsequent purchasers: *Rourke* v. *Bullens*, 8 Gray, 550; *Harlow* v. *Hall*, 132 Mass. 232; *Hallgarten* v. *Oldham*, 135 Mass. 1. The same doctrine as to subsequent purchasers seems to prevail in Maine: *Jewett* v. *Lincoln*, 14 Me. 116 (31 Am. Dec. 36); in New Hampshire: *Crawford* v. *Forristall*, 58 N. H. 114; and in Vermont: *Fletcher* v. *Howard*, 2 Aik. 115 (16 Am. Dec. 686). In *Thorndike* v. *Bath*, 114 Mass. 116, the subject of the sale was an unfinished piano, left in the seller's possession to be completed. It was subsequently sold to a second purchaser, who bought without notice of the previous sale. It was held that an exception to the rule requiring delivery must be made where the article is not in a deliverable state.

The rule above stated prevails also in Arkansas. In *Davis* v. *Meyers*, 1 S. W. 95, T sold a lot of merchandise to M, in payment of a debt. The goods were packed ready for delivery, but were left in the seller's store house. Later, before removal, T executed a mortgage to D, who immediately took possession, without notice of the previous sale. "It is superfluous," says the court, "to inquire whether the effect of this transaction was to transfer to M the title or property in the goods as against D, for, as we understand the law, in order to make the sale effectual against subsequent purchasers or attaching creditors, there must be an actual delivery—a visible and substantial change of possession."

III. The third class of cases holds that public policy, for various reasons, demands that there shall be a change of possession, in order to give notice to the public.

Trade would be more hampered if the purchaser bought always under the fear of having the property taken from him by some prior purchaser from the same vendor, and it is in the interest of justice in commercial dealings to hold that purchasers leave the goods in the seller's possession at their own risk. The ease with which fraud may be committed, if there is no change of possession, is assigned by some of the courts as the reason for requiring a visible change of possession, to pass title as against third persons. *Norton* v. *Doolittle*, 32 Conn. 410.

In Pennsylvania two grounds for the doctrine are usually assigned: first, that retention of possession is *per se* fraudulent as to third persons, and, second, that of two innocent persons, he whose act makes the wrong possible must bear it. In *Shaw* v. *Levy*, 17 S. & R. 99, Rogers, J., says: "The delivery, so far as practicable, should be an external, visible change of posession, open and apparent to the world, and not a mere formal delivery on paper, while the ostensible owner remains the same. I do not consider that this principle depends upon any secret trust between the original parties, but upon public policy and the sound maxim that where one of two innocent persons must suffer, the one causing the loss must bear it. See further: *Winslow* v. *Leonard*, 24 Pa. St. 14; *Stephens* v. *Gifford*, 137 Pa. St. 219 (21 Am. St. Rep. 868); *Davis* v. *Bigler*, 62 Pa. St. 242 (1 Am. Rep. 393); *Herr* v. *Denver etc. Co.*, 22 Pa. St. 773. This view obtains also in Illinois: *Burnell* v. *Robertson*, 5 Gilm. 282. Compare Benjamin on Sales. (6th Ed. by Bennett), pp. 458, 678–684.

If there are any express decisions to the contrary, I have not been able to find them. The searcher along these lines is warned, however, to expect to meet with many statements to the contrary, in head-notes, digests, text books and extra-judicial outgivings.

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